# Seratim Sdn Bhd v The Customs Appeal Tribunal & Anor

HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO BKI-24–31/4 OF 2019 (HC2)
MAIRIN IDANG J
9 MARCH 2020

*Customs and Excise — Export — Claim for input tax refund — Claim rejected by Royal Malaysian Customs Department — Appeal against rejection dismissed by Customs Appeal Tribunal — Whether sawn timbers shipped were deemed exported goods/supplies to enable for an input tax refund for taxable period — Whether appellant an 'exporter' eligible for input tax refund for taxable period — Customs Act 1967 ss 84, 87 & 90 — Goods and Services Tax Act 2014 ss 17(1)(b), 38(3) & 39(1) — Rules of Court 2012 O 7 r 2 & O 55A r 1*

The appellant was a company which engaged in the business of supplying and exporting sawn timber to overseas customers. The appellant had submitted to the Royal Malaysian Customs Department ('RMCD') two applications for an input tax claim ('ITC') for the taxable period of 31 August 2016 and 31 October 2016 respectively but both applications were rejected. The appellant's appeal to the Customs Appeal Tribunal ('the first respondent') against RMCD's decision was dismissed, hence, the present appeal. The present appeal was filed pursuant to O 7 r 2 and O 55A r 1 of the Rules of Court 2012 ('the ROC') whereby the appellant sought, inter alia, the following orders: (a) an order that the whole of the decision of the first respondent to be set aside; (b) an order that the appellant was entitled to claim the input tax refund ('ITR') for the taxable period of 31 August 2016 and 31 October 2016 under ss 38(3) and 39(1) of the Goods and Services Tax Act 2014 ('the GST Act'); (c) a declaration that the appellant was the owner of the sawn timbers and the same had been exported to overseas despite the discrepancies in details between the tax invoices and K2 Forms; and (d) a declaration that the appellant's sawn timbers which had been exported was a 'zero-rated supply' under s 17(1)(b) of the GST Act. The issues arose were: (i) whether the sawn timbers shipped were deemed exported goods/supplies to enable for an ITR for the taxable period of 31 August 2016; and (i) whether the appellant was an 'exporter' eligible for ITR for the taxable period of 31 October 2016 from the RMCD.

**Held**, dismissing the appeal with costs of RM5,000 to the respondents:

(1) As a matter of law, the sawn timbers involved in the appellant's trade were legally categorised as non-dutiable goods in the Customs Duties Order 2012 and thus, were distinctly subjected to the statutory requirements of

ss 84 and 87 of the Customs Act 1967 ('the Customs Act'). The stringent requirement of a declaration vide the submission of a K2 Form as a specific instrument under the Customs Act made it clear that the K2 Form would be the first and foremost document to be relied upon and referred to by the customs officers in ascertaining the non-dutiable goods/supplies that are to be exported. In the present case, the appellant failed to adhere to such requirement (see paras 20–22).

(2) When there was no submission of a properly filled-out K2 Form to indicate the exact details of the sawn timbers that were 'exported' during the taxable period of 31 August 2016 by the appellant, there was no proof that there was an export of sawn timbers and since there was also no apparent attribution between the input tax and supply made by the appellant due to the discrepancies of the documents submitted that fulfilled the requirement set under s 39(1) of the GST Act, hence, the application for ITR was erroneous . There was no exportation of goods by the appellant under the governing provisions of the Customs Act and the GST Act and the first respondent had arrived at his decision correctly in rejecting the appellant's application for ITR for the taxable period of 31 August 2016 (see paras 29–30).

(3) The appellant's contention that it was the rightful 'exporter' and 'owner' of the exported sawn timber for the taxable period of 31 October 2016 was untenable and could not be accepted in light of the failure of the appellant to fulfill the strict requirements in appointing a recognised agent under s 90 of the Customs Act. In addition, exporters were explicitly obliged to prepare the K2 Form to be submitted to the customs officers on duty under s 84 of the Customs Act. The appellant had failed to fulfill this obligation. In the present appeal, the appellant had failed, on a balance of probabilities, to prove that it had indeed exported the sawn timbers to its overseas customers be it by its own name or by its appointed agents purportedly acting on its behalf and was therefore, not eligible to claim for ITR for the taxable period of 31 October 2016 (see paras 36, 38, 40 & 42).

**[Bahasa Malaysia summary**

Perayu adalah syarikat yang menjalankan perniagaan membekal dan mengeksport kayu gergaji kepada pelanggan luar negara. Perayu telah memfailkan dua permohonan tuntutan cukai input ('TCI') kepada Jabatan Kastam Diraja Malaysia ('JKDM') untuk tempoh kena cukai 31 Ogos 2016 dan 31 Oktober 2016 tetapi kedua-dua permohonan tersebut ditolak. Rayuan perayu ke Tribunal Rayuan Kastam ('responden pertama') terhadap keputusan JKDM ditolak, oleh itu, rayuan semasa. Rayuan ini difailkan menurut A 7 k 2 dan A 55A k 1 Kaedah-Kaedah Mahkamah 2012 ('KKM') di mana perayu memohon, antara lain, perintah berikut: (a) perintah bahawa keseluruhan keputusan responden pertama diketepikan; (b) perintah bahawa perayu berhak

menuntut pengembalian cukai input ('PCI') untuk tempoh kena cukai 31 Ogos 2016 dan 31 Oktober 2016 berdasarkan ss 38(3) dan 39(1) Akta Cukai Barang dan Perkhidmatan 2014 ('Akta GST'); (c) perisytiharan bahawa perayu adalah pemilik kayu gergaji dan kayu gergaji tersebut telah dieksport ke luar negara walaupun terdapat perbezaan perincian antara invois cukai dan Borang K2; dan (d) perisytiharan bahawa kayu gergaji perayu yang telah dieksport adalah 'pembekalan berkadar sifar' di bawah s 17(1)(b) Akta GST. Isu-isu yang timbul adalah: (i) sama ada kayu gergaji yang dihantar dianggap sebagai barang/bekalan yang dieksport untuk membolehkan permohonan PCI untuk tempoh kena cukai 31 Ogos 2016; dan (i) sama ada perayu adalah 'pengeksport' yang layak untuk PCI untuk tempoh kena cukai 31 Oktober 2016 dari JKDM.

**Diputuskan**, menolak rayuan dengan kos RM5,000 diberikan kepada responden-reponden:

(1) Dalam undang-undang, kayu gergaji yang terlibat dalam perdagangan perayu secara sah dikategorikan sebagai barang yang tidak dikenakan cukai dalam Perintah Cukai Kastam 2012 dan dengan demikian, secara jelas dikenakan syarat undang-undang ss 84 dan 87 Akta Kastam 1967 ('Akta Kastam'). Syarat deklarasi yang ketat melalui penyerahan Borang K2 sebagai instrumen khusus di bawah Akta Kastam menjelaskan bahawa Borang K2 akan menjadi dokumen pertama dan terpenting yang harus diandalkan dan dirujuk oleh pegawai kastam dalam memastikan barang/bekalan yang tidak dikenakan cukai yang akan dieksport. Dalam kes ini, perayu gagal memenuhi syarat tersebut (lihat perenggan 20–22).

(2) Apabila tidak ada penyerahan Borang K2 yang diisi dengan betul untuk menunjukkan perincian yang tepat mengenai kayu gergaji yang 'dieksport' selama tempoh kena cukai 31 Ogos 2016 oleh perayu, maka tidak ada bukti bahawa terdapat eksport kayu gergaji dan oleh kerana tidak ada kaitan yang jelas antara cukai input dan pembekalan yang dibuat oleh perayu kerana percanggahan dokumen yang dikemukakan yang tidak memenuhi syarat yang ditetapkan di bawah s 39(1) Akta GST, oleh itu, permohonan untuk PCI adalah satu kekhilafan. Tidak ada pengeksportan barang oleh perayu di bawah peruntukan undang-undang Akta Kastam dan Akta GST dan responden pertama telah membuat keputusannya dengan tepat dalam menolak permohonan perayu untuk PCI untuk tempoh kena cukai 31 Ogos 2016 (lihat perenggan 29–30).

(3) Hujahan perayu bahawa ia adalah 'pengeksport' dan 'pemilik' sah kayu gergaji yang dieksport untuk tempoh yang dikenakan cukai pada 31 Oktober 2016 tidak dapat dipertahankan dan tidak dapat diterima berikutan kegagalan perayu memenuhi syarat ketat dalam melantik ejen yang diakui di bawah s 90 Akta Kastam. Di samping itu, pengeksport

secara jelas diwajibkan untuk mengisi Borang K2 untuk diserahkan kepada pegawai kastam yang bertugas berdasarkan s 84 Akta Kastam. Perayu telah gagal memenuhi kewajiban ini. Dalam rayuan semasa, perayu telah gagal, di atas imbangan kebarangkalian, untuk membuktikan bahawa ia memang telah mengeksport kayu gergaji kepada pelanggannya di luar negara sama ada dengan menggunakan namanya sendiri atau melalui ejennya yang kononnya dilantik untuk bertindak bagi pihaknya dan oleh itu, perayu tidak layak menuntut PCI untuk tempoh kena cukai 31 Oktober 2016 (lihat perenggan 36, 38, 40 & 42).]

**Cases referred to**

*Fong Thin Choo, Re* [1992] 1 SLR 120; [1991] 4 CLJ Rep 798, HC (refd)
*Public Prosecutor v Billion Nova Sdn Bhd & Ors* [2016] MLJU 1823; [2016] 2 CLJ 763, CA (refd)

**Legislation referred to**

A New Tax System (Goods and Services Tax) Act 1999 [AUS] s 38185(1), items 1, 2, 3, 4, 4A
Customs (Prohibition of Exports) Order 1967 O 3
Customs Act 1967 ss 2, 12(3), 35(b), 39(1)(b), 84, 84(1), 87, 90, 90(1), (2), 133
Customs Duties Order 2012
Goods and Services Tax Act 2014 ss 9(1)(a), 17, 17(1), (1)(b), 38, 38(3), 39, 39(1), (1)(b)
Malaysian Timber Industry Board (Incorporation) Act 1973 s 13
Rules of Court 2012 O 7 r 2, O 55A r 1

*(Lind Willie Wong & Chin) for the appellant.*
*(Jabatan Kastam Diraja Malaysia) for the respondents.*

**Mairin Idang J:**

APPLICATION

**[1]** The appellant, Seratim Sdn Bhd, in filing an appeal against the decision of the Customs Appeal Tribunal pursuant to O 7 r 2 and O 55A r 1 of the Rules of Court ('the ROC 2012') is seeking the following orders:

(a) an order that the whole of the decision of the Customs Appeal Tribunal dated 6 March 2019 to be set aside;

(b) an order that the appellant is entitled to claim from the Director General of Customs the input tax refund for the taxable period of 31 August 2016 and 31 October 2016 under ss 38(3) and 39(1) of the Goods and Services Tax Act 2014;

(c) a declaration that the appellant is the owner of the sawn timbers and the same has been exported to overseas despite the discrepancies in details between the tax invoices and K2 Forms;

(d) a declaration that the appellant's sawn timbers which has been exported is a 'zero-rated supply' under s 17(1)(b) of the Goods and Services Tax Act 2014; and

(e) further order and/relieve and/or ancillary orders that is fair and just as decided by this honourable court.

## THE BACKGROUND FACTS

**[2]** The relevant facts in this appeal are as follows:

(a) the appellant is a trading company which engages in the business of supplying and exporting of sawn timber to overseas customers and is duly registered under the Goods and Services Tax Act 2014 ('GST') with the registration number 01126416384;

(b) in the year 2016, the appellant submitted to the Royal Malaysian Customs Department ('RMCD') two applications for an input tax claim ('ITC') for the taxable period of 31 August 2016 and 31 October 2016 respectively;

(c) in both instances of export activities for the aforesaid taxable periods, the appellant had engaged various third parties by issuance of letters of authorisation to the same to ship sawn timbers on its behalf to its overseas customers;

(d) however, both claims made by the appellant were rejected by the RMCD;

(e) in a letter dated 21 February 2017, RMCD rejected the appellant's ITC application for the taxable period of 31 August 2016 on the grounds that there were discrepancies found between the declared amount stated in the submitted Item 11 of Goods and Services Tax Return Form ('the GST-03') and the relevant attached supporting documents;

(f) the RMCD had also rejected the appellant's ITC application for the taxable period of 31 October 2016 vide a letter dated 24 May 2017 stating that since the appellant was not named as the exporter in the prescribed K2 Forms but its appointed 'agent' instead, the appellant is not eligible to submit an input tax claim as an exporter;

(g) subsequently, the appellant filed for a review of both decisions made by the RMCD but both applications failed vide letters dated 22 June 2017 and 12 October 2017 respectively;

(h) dissatisfied with the RMCD's decisions, the appellant then appealed to the Goods and Services Tax Tribunal;

(i) on 6 March 2019, after hearing evidence and submission by both parties, the first respondent (following the abolishment of the Goods and Services Tax Act effective 1 September 2018) dismissed the appellant's appeal. Hence, this present appeal before this court.

THE GROUNDS OF APPEAL

**[3]** The appellant's grounds of appeal are as follows:

(a) the first respondent had erred in law in deciding that the appellant is not entitled to claim for tax input refund on the following grounds:

(i) that the appellant's shipping of sawn timbers at the material time had indeed fulfilled the definition of 'export' under s 2 of the Customs Act 1967 and the presumption of export under s 35(b) of the Customs Act 1967;

(ii) that the appellant fulfilled the definition of 'exporter' under s 2 of the Customs Act 1967 notwithstanding the appointment of an agent to export sawn timbers to overseas customers on its behalf;

(iii) that non-compliance by the appellant to the requirements under s 84 of the Customs Act 1967 in respect of the declaration of particulars of goods in the prescribed K2 Forms does not mean the appellant's sawn timbers are not exported goods;

(iv) that non-compliance by the appellant to the requirements under O 3 of the Customs (Prohibition of Exports) Order 1967 and s 13 of the Malaysian Timber Industry Board (Incorporation) Act 1973 in respect of the declaration of particulars of goods in the prescribed K2 Forms does not render the appellant's sawn timbers as non-export goods;

(v) that the appellant had satisfied all requirements provided under ss 38 and 39 of the Goods and Services Tax Act 2014 to be entitled for an input tax refund; and

(vi) that the shipped sawn timbers by the appellant through its appointed agents during the relevant taxable periods are qualified as zero-rated supplies under s 17 of the Goods and Services Tax Act 2014; and

(b) the first respondent had failed to consider the appellant's evidence in relation to the status of the shipped sawn timbers as being exported goods.

A FINDINGS OF THE COURT

**[4]** The core issues of this present appeal lie in two parts: (i) whether the sawn timbers shipped are deemed exported goods/supplies to enable for an input tax refund ('ITR') for the taxable period of 31 August 2016; and (ii) whether the appellant is an 'exporter' eligible for ITR for the taxable period of 31 October 2016 from the RMCD. Now I discuss the issues.

*Whether the appellant's sawn timbers are deemed goods/supplies that are exported to enable for an input tax refund ('ITR') by the appellant for the taxable period of 31 August 2016*

**[5]** In order to find if certain goods/supplies are subjected to chargeable tax, one must first understand the imposition and scope of the Goods and Services Tax.

**[6]** Section 9(1)(a) of the Goods and Services Tax Act 2014 provides as follows:

> A tax to be known as *goods and services tax, shall be charged* and levied on —
>
> (a) *any supply of goods or services made in Malaysia*, including anything treated as a supply under this Act ... (Emphasis added.)

**[7]** The GST can only be zero-rated, where no tax would be chargeable on the goods/supplies, under very specific circumstances as clearly found in s 17(1) of the Goods and Services Tax Act 2014:

> (1) *A zero-rated supply is* —
>
> (a) any supply of goods or services determined to be a zero-rated supply by the Minister under subsection (4); and
>
> (b) any supply of goods *if the goods are exported* ... (Emphasis added.)

**[8]** In the context of the present appeal before this court, it should be clear that any taxable person is entitled to credit or to submit an application for an ITR, in any taxable period, the input tax for the period that *is allowable and reasonable to be attributable* to the following supplies made in the course of businesses, as laid down in s 39(1)(b) of the Goods and Services Tax Act 2014:

> (b) any *supply made outside Malaysia which would be a taxable supply if made in Malaysia* ... (Emphasis added.)

**[9]** In short, for the appellant to succeed in its claim for an ITR for the taxable period of 31 August 2016, the appellant would need to prove the value

of input tax declared must be attributable to the exportation of sawn timbers to its overseas customers. A

**[10]** Section 2 of the Customs Act 1967 defines 'export' as:

> ... *to take or cause to be taken out of Malaysia* by land, sea or air or *to place any goods in a vessel*, conveyance or aircraft *for the purpose of such goods being taken out of Malaysia* by land, sea or air. (Emphasis added.) B

**[11]** In full reliance of the aforesaid definition, it is the appellant's submission that the bill of lading, a receipt that was issued by the shipping company to acknowledge receipt of goods by a carrier/shipper's agent is sufficient proof that the supplies of sawn timbers have been loaded onto vessels which then have departed from the port in Malaysia to various overseas destination. C

D

**[12]** It was further submitted that other miscellaneous documents produced by the appellant such as tax invoices issued to overseas customers, letters of authorisation to third parties to act as agents, receipts of cess payment, freight charges by shipping agents and payment proofs to overseas customers are definite evidences that the sawn timbers have been shipped internationally and are deemed goods/supplies that have been exported and is thus eligible for an ITR. E

**[13]** However, the second respondent countered by submitting the following: F

(a) the type of sawn timbers used in the appellant's trade as declared for the taxable period of 31 August 2016 are specifically Red Meranti and Balau woods, where under the Customs Duties Order 2012 [PU(A) 275/2012] are considered as non-dutiable goods;

G

(b) declaration of non-dutiable goods are expressly subjected to the conditions laid down under ss 84(1) and 87 of the Customs Act 1967 which states that exporters are to declare such goods when exported by sea or air in the prescribed form known as the *Borang Pengisytiharan Barang yang akan Dieksport* ('the K2 Form') by providing full and true particulars of the same; H

(c) the appellant, in applying for ITR for the taxable period of 31 August 2016, had tendered a K2 Form riddled with numerous discrepancies which could not be supported nor justified when cross-referred to other submitted miscellaneous documents; and I

(d) since there is a failure to comply to a statutory requirement in declaring exported goods on the appellant's side, the supply of sawn timbers could not be recognised as being exported under law and must be treated as

standard-rated supply under s 12(3) of the Customs Act 1967, ultimately rendering it as goods not qualified for ITR application under s 39(1)(b) of the Customs Act 1967.

**[14]** Sections 84(1) and 87 of the Customs Act 1967 states:

> 84(1) *When any goods which are not dutiable on export are exported* by sea or air *the exporter thereof shall*, before such goods are shipped or water-borne to be shipped or transported otherwise to be shipped or loaded into an aircraft, *make personally or by his agent* to the proper officer of customs at the customs port at which such goods are to be shipped or at the customs airport at which such goods are to be loaded or at other prescribed place, *a declaration substantially in the prescribed form, giving particulars of the goods to be exported.*
>
> 87 *The declarations referred to in sections* 81, 82, 83, *84*, 85 and 86 *shall give a full and true account* of the particulars for which provision is made *in the respective prescribed forms* ... (Emphasis added.)

**[15]** In reference to the aforesaid provision, the appellant is of the stance that the requirements under s 84 of the Customs Act 1967 is inapplicable in deciding on whether the appellant's sawn timbers have indeed been exported but rather is entirely set down for an exporter or its agents to declare on the particulars of the exported goods in a prescribed form.

**[16]** The appellant also firmly takes the position that by the above reasoning, it suffices to say that the appellant had indeed exported the sawn timbers to its overseas customers and is justified to claim for ITR despite discrepancies in details in the submitted K2 Form under the argument that it is 'a practice for more than 30 years' based on the appellant's other miscellaneous documents and explanation in various affidavits and written submission in the hearing before the first respondent.

**[17]** In support of its contention, the appellant further referred to several foreign authorities such as Notice 703 of the United Kingdom and Australian Taxation Office: Goods and Services Tax Rulings (GSTR 2002/6 – Goods and Services Tax: Exports of goods, items 1 to 4A of the table in sub-s 38185(1) of the A New Tax System (Goods and Services Tax) Act 1999 (12 August 2015)) issued by the Australian Taxation Office and also case laws such as *Public Prosecutor v Billion Nova Sdn Bhd & Ors* [2016] MLJU 1823; [2016] 2 CLJ 763 where:

> ... the Court of Appeal rejected the public prosecution's appeal and ruled that the supply of cigarettes have been exported from Labuan to Brunei and hence there was no custom duty payable.

And the Singaporean case of *Re Fong Thin Choo* [1992] 1 SLR 120; [1991] 4

CLJ Rep 798 where:

> the High Court held that the Customs was wrong in holding that the supply of goods have not been exported on the basis of the discrepant Manifest and the irregular Mates Receipt ...

**[18]** It was also submitted by the appellant that:

(a) a non-compliance of the requirement set down in s 84 of the Customs Act 1967 can be remedied by invoking s 133 of the Customs Act 1967 where relevant authorities may penalise such defaulting exporters; and

(b) since the appellant has never received or has been convicted under the aforesaid provision, thus the appellant did not fail to comply with s 84(1) of the Customs Act 1967.

**[19]** However, I disagree with the appellant and hereinbelow are my reasons.

**[20]** As a matter of law, the sawn timbers involved in the appellant's trade are legally categorised as non-dutiable goods in the Customs Duties Order 2012 under the respective headings of 4407.25.400 and 4407.29.490 and thus, are distinctly subjected to the statutory requirements of s 84 and 87 of the Customs Act 1967.

**[21]** The stringent requirement of a declaration vide the submission of a K2 Form as a specific instrument under Customs Act 1967 makes it clear that the K2 Form would be the first and foremost document to be relied upon and referred to by the customs officers in ascertaining the non-dutiable goods/supplies that are to be exported.

**[22]** Yet, the appellant in this appeal failed to adhere to such requirement accordingly.

**[23]** A lack of a conviction under s 133 of the Customs Act 1967 does not negate the fact that the appellant had failed to submit a prescribed form with true, correct and accurate particulars of the exported goods to the relevant authorities in accordance with the law. Verily, it only shows that enforcement actions are yet to be taken by the relevant authorities when this matter was brought before the respondents at the material time.

**[24]** As a matter of fact, not only are all such miscellaneous documents that were produced by the appellant in support of its case gives no room/opportunity for the respondents to ascertain its accuracy but the very details in these miscellaneous documents are also inconsistent with those stated in the submitted K2 Form.

A **[25]** A careful review of the evidence would not support the contention of the appellant as it was clearly pointed out by the second respondent in para 3 of their further submission that the multiple discrepancies found are not minor in nature and goes down to the root of the whole matter, ie whether or not the sawn timbers are deemed exported goods or otherwise.

B

**[26]** I am of the opinion that acceptance of any discrepancies and/or inaccuracies in the K2 Form notwithstanding the statutory requirement laid down in s 84(1) and 87 of the Customs Act 1967 would have an adverse effect in that it renders strict legal procedural requirements redundant and merely C academic in nature. Such blatant breach of statutory procedural requirements cannot be excused or accepted. This, in time, would open a floodgate of unjustified applications for ITC by unscrupulous parties who will take advantage of such lax approach to the non-compliance of these statutory provisions.

D

**[27]** Alternatively, even if these inconsistencies and discrepancies are 'usual practice' as is lengthily explained by the appellant, I do not see any definite proof and/or evidence to substantiate such practices, much less to be taken as an authority in justifying the appellant's negligence in submitting an E inconsistent and inaccurate K2 Form.

**[28]** I am of the opinion that notwithstanding the alleged acceptance and endorsement by various parties on such long practices of blatant disregard for the existing statutory requirements in this field, two wrongs do not make a F right. The appellant, as a player in this field owes an ethical duty to be truthful to the RMCD in its course of business to assist the smooth function of such authorities. Therefore, it is safe to say that the only legitimate document at hand that can be relied on and/or cross-referred to by the customs officers immediately upon receipt of the application of ITR for the taxable period of G 31 August 2016 is the submitted K2 Form.

**[29]** As such, I agree with the second respondent's argument that when there is no submission of a properly filled-out K2 Form to indicate the exact details H of the sawn timbers that were 'exported' during the taxable period of 31 August 2016 by the appellant, there is no proof that there was an export of sawn timbers as claimed by the appellant and since there was also no apparent attribution between the input tax and supply made by the appellant due to the discrepancies of the documents submitted that fulfils the requirement set I under s 39(1) of the Goods and Services Tax 2014, hence, the application for ITR is erroneous.

**[30]** There was no exportation of goods by the appellant under the governing provisions of the Customs Act 1967 and the Goods and Services Tax Act 2014 and that the first respondent had arrived at his decision correctly in rejecting the appellant's application for ITR for the taxable period of 31 August 2016.

*Whether the appellant is an 'exporter' eligible for ITR for the taxable period of 31 October 2016 from the Royal Malaysian Customs Department*

**[31]** It was undisputed by both the appellant and the second respondent as to the sawn timbers exported out for the taxable period of 31 October 2016 but rather on whether the sawn timber were indeed exported out by the appellant.

**[32]** The second respondent averred that the appellant is not a party in the exportation of sawn timbers for such taxable period of 31 October 2016 due to the submission of a K2 Form to the RMCD that does not name the appellant as the exporter and is therefore not entitled to claim for ITR.

**[33]** The appellant, on the other hand, submitted that:

(a) it had purchased appointed third party local suppliers as its agents under a 'free on board' terms to supply and export the appellant's orders of sawn timbers to its overseas customers during the taxable period of 31 October 2016;

(b) since the K2 Form was prepared by the appointed agents, it resulted in the submission of a K2 Form that does not reflect the appellant as the exporter of the said goods but the agents' instead; and

(c) however, the local suppliers were merely exporting the sawn timbers on behalf of the appellant and that the latter is the actual 'exporter' and the 'owner' fitting the definition under s 2 of the Customs Act 1967.

**[34]** Section 2 of the Customs Act 1967 defines 'exporter' and 'owner' respectively as including:

> ... *any person by whom any goods* (including goods transferred from an importing aircraft or ship) *are exported from Malaysia* or supplied for use as aircraft's or ship's stores, *and also the owner, or any person acting on his behalf*, and any person *who for customs purposes signs any document relating to goods exported* or intended for exportation or supplied or intended for supply as aircraft's or ship's stores as aforesaid.
>
> ... *any person* (other than an officer of customs acting in his official capacity) *being* or holding himself out to be the *owner, importer, exporter, consignee, agent* or person *in possession of, or beneficially interested in,* or having any control of, or power of disposition over, *the goods.* (Emphasis added.)

**[35]** Be that as it may, the second respondent argued that the provisions of s 90 of the Customs Act 1967 must be taken into consideration as it lists down the legal requirements before a person or an entity is permitted to be a lawful agent of the exporter.

**[36]** After examining the evidence and careful reading of the relevant provisions relied upon, I find that the appellant's contention that it is the rightful 'exporter' and 'owner' of the exported sawn timber for the said taxable period is untenable and cannot be accepted in light of the strict requirements in appointing a recognised agent under s 90 of the Customs Act 1967.

**[37]** Section 90(1) and 90(2) of the Customs Act 1967 provides as follows:

> (1) Any *person who intends to act as an agent* shall —
>
> (a) *attend a course* on matters relating to customs and *pass such examination* as may be specified by the Director General;
>
> (b) *produce a written authority* from the person on whose behalf he is to act; and
>
> (c) *give such security* as may be considered adequate by a senior officer of customs for the faithful and incorrupt conduct of such agent and of his clerks acting for him both as regards the customs and his employers.
>
> (2) Subject to subsection (1) *any application for permission to act as an agent* for transacting business relating to the import or export of any goods or luggage or the entry or clearance of any vessel or aircraft *shall be considered by a senior officer of customs who may give such permission* subject to such terms and conditions as he may deem fit to impose ... (Emphasis added.)

**[38]** I am inclined to agree with the second respondent's submission and find that under no circumstances did the appellant show that its purported appointed agents have satisfied the above three statutory requirements under s 90 of the Customs Act 1967 to be recognised as lawfully appointed agents of the appellant.

**[39]** The letters of authorisation produced by the appellant in the appointment of the purported agents to act on its behalf is only able to, at most, prove the second element of s 90 of the Customs Act 1967, however, I do not see that the remaining two requirements are to be ignored and dispensed with by the appellant or its purported agents.

**[40]** I also find that exporters are explicitly obliged to prepare the K2 Form that will be submitted to the customs officers on duty under s 84 of the Customs Act 1967 of which the third-party companies have fulfilled in the

exportation of the sawn timbers with the appellant's name nowhere in sight.

**[41]** One should be reminded at this juncture that s 87 of the Customs Act 1967 has also clearly stated that all particulars stated in the K2 Form must be true and correct and for the appellant to yet again come before the respondents seeking for the submitted statutorily prescribed K2 Form to be disregarded and instead, take into consideration of its evidence which constitutes merely of letters of authorisation to the purported agents is unjustified.

**[42]** In the present appeal, this court finds that the appellant has failed, on a balance of probabilities, to prove that it had indeed exported the sawn timbers to its overseas customers be it by its own name or by its appointed agents purportedly acting on its behalf and is therefore, not eligible to claim for ITR for the taxable period of 31 October 2016.

CONCLUSION

**[43]** Based on the above findings, I am satisfied and hold that the second respondent had acted fairly and in accordance with the existing provisions of the law relating to the present appeal in the rejection of the appellant's application for ITR for both taxable periods of 31 August 2016 and 31 October 2016.

**[44]** I have considered all other produced evidences which were not categorically identified herein and find that they could not affect the overall finding of this court.

**[45]** In conclusion, for the reasons aforesaid, I find this appeal to be devoid of any merits and the same is dismissed with costs of RM5,000 to the respondents.

*Appeal dismissed with costs of RM5,000 to the respondents.*

Reported by Dzulqarnain bin Ab Fatar